THRIMALAI PALAMIAPPAN & ANOR

v.

MOHD. MASRY TUKIMIN

HIGH COURT MALAYA, JOHOR BAHRU
M. SHANKAR J
[CIVIL SUIT NO. 96 OF 1985]
15 JANUARY 1986

DAMAGES: *Quantum - Multiple injuries - Fracture of right femur and acetabulum - Vaginal injuries - Right forearm - Amputation of leg - Genital contusions and lacerations - Principles of assessment - Onus of proving special damages - Issue of costs.*

As a result of a road accident, the plaintiff suffered multiple injuries (reproduced in full in the judgment). Her right leg was also amputated above the knee. At trial liability was admitted and there were agreed special damages for various expenses incurred. General damages and the loss of past and future earnings were in issue.

Held:

[1] In cases of multiple injuries, it is not the correct approach to assess what each would be worth separately and then to insist upon payment of the global figure so arrived at. The end result of such an exercise is evident in the present case where the global award claimed almost approached what a Court would award to a paraplegic.

[2] Taking all the relevant facts into consideration and also the all important factor that the global sum assessed for several injuries should be scaled down by reason of overlapping, the sum of RM85,000 was awarded for general damages.

[3] Special damages must be strictly proved. The evidentiary burden goes beyond establishing the claim on a mere balance of probabilities. The figure put forward for special damages must come as close to mathematical certainty as the circumstances of the case would allow.

[4] On the evidence, the award for past earnings was made at the rate of RM4 per day for 26 working days per month for 15 months (from date of accident to the date of judgment).

[5] Under the head of proportionate loss of earning capacity, attributable to the residual facilities, RM5,000 was awarded. General damages therefore totalled RM90,000 and interest was awarded at 8% p.a. from the date of service of the writ up to the date of this judgment.

[6] There will be interest at 4% p.a. from the date of the service of the writ on the agreed specials and past earnings up to the date of judgment.

[7] The other specials awarded will be lumped into a decretal amount on which interest will run at 8% p.a. from the date of judgment to date of realization.

[8] On the question of costs, maintaining credibility must be a matter of mutual concern both for the law and lawyers alike. The problems generated in this respect by permitting plaintiffs to persist in exaggerated notions of the value of their claims must be self-evident. One way of putting matters back into proper perspective is to take cognizance of cases of *Calderbank v. Calderbank* [1975] 3 All ER 333, *Cutts v. Head & Anor.* [1984] 1 All ER 557 and generally Supreme Court Practice (1985) - 22/1/6, 62/2/11 and 62/2/86. A genuine offer letter without admission of liability can be made to do the work of an actual payment into Court.

[Costs of this action be taxed and paid by the defendant to the plaintiffs.]

Cases referred to:
Phua Jee Suan v. Nila Vasu Pillai [1973] 1 MLJ 186
Wieland v. Cyril Lord Carpets Ltd. [1969] 3 All ER 1006
Lee Sau Kong v. Leow Cheng Chiang [1961] MLJ 19
Calderbank v. Calderbank [1975] All ER 333
Cutts v. Head & Anor. [1984] 1 All ER 557

Other source referred to:
Supreme Court Practice [1985] - 22/1/6, 62/2/11, 62/2/86

For the plaintiffs - N.K. Sandhu; M/s. N.K. Sandhu & Co.
For the defendant - S.P. Veloo; M/s. V.P. Nathan & Partners

JUDGMENT

M. Shankar J:

In 1984 there were 617 fatalities from road accidents alone in Johore State. Those who survived with injuries numbered 3189. The plaintiff was one of them.

At the time of her accident on the 17 October 1984, she was 32 years old. She had been married 16 years. Her first child arrived within the first year of her marriage. Four others followed, the last of which was born some seven years before the date of the accident.

The direct injuries caused by the impact were as follows:

a) Fracture mid shaft right femur;

b) Fracture acetabulum of pelvis on both sides;

c) About 10 cm. lacerated wound over her genitals. Anterior wall of vagina was torn and extending to urethral opening;

d) Multiple contusions and abrasions around external genitalia;

e) 15 cm. laceration over inguinal region on right side. This was a deep laceration exposing the muscles and the pubic bone;

f) 10cm. x 12 cm. laceration over right knee with skin loss. The Patella was exposed;

g) 4 cm. laceration over right shin;

h) 4 cm. laceration over dorsum of right foot;

i) Punctured wound over right forearm.

She was admitted into hospital and there her right leg was amputated above the knee. In due course she was discharged from the hospital. A medical report dated the 26 June 1985 reveals that she had coitus about one month previously but it was painful. The doctor states that cosmetically the vaginal opening shows distortion as a result of the injury but that this can be rectified by surgery. He further states that the plaintiff is capable of having sexual intercourse but because of the injuries would not be able to have it in all positions. The husband will not be able to put his weight on her. Full penetration is possible but the movements on the part of the husband will have to be gentle. If conception occurs, normal delivery is no longer possible. A caesarean is required.

The plaintiff comes from humble circumstances. Apart from her role as housewife and mother she also operated a canteen in a factory in Pasir Gudang.

The trial took place on the 12 September 1985. Liability was admitted. There were agreed special damages of RM2,513 for various expenses incurred. General damages and the loss of past and future earnings were in issue.

The approach taken by the plaintiff's Counsel was to take each of the injuries in turn, and set them beside awards made in previous cases for injuries of that kind and thereby arrive at a global figure. Thus it was submitted that the appropriate component awards for various items should be as follows:

a) For the fracture of the right femur	...	RM14,000
b) For the fracture acetabulum	...	RM20,000
c) For the vaginal injuries	...	RM36,000
d) For the genital contusions laceration on the inguinal region knee and shin and the dorsum of the right foot	...	RM25,000
e) For the right forearm	...	RM 6,500
f) For the amputation of the leg	...	RM50,000

These components yield a total figure of RM151,500.

At the commencement of the trial in an effort to see if the gap could be bridged, I asked Counsel for both parties what their respective estimates were for general damages. The gap was so wide that there was no option but to proceed.

Having reached the journey's end, I feel impelled to state once again that in cases of multiple injuries, it is not the correct approach to assess what each would be worth separately and then to insist upon payment of the global figure so arrived at. The end result of such an exercise is evident in the present case where the global award claimed almost approached what a Court would award to a paraplegic. Can we ignore the fact that notwithstanding the lacerations to various areas of the right leg, the leg itself is no longer there since it has been amputated. At the risk of repetition therefore I would state once again that where pain and suffering, loss of amenities, and discomfort to a plaintiff result from multiple injuries it would be wrong to value each injury as though the others had not taken place and then to add all the figures together. (See *Phua Jee Suan v. Nila Vasu Pillai* [1973] 1 MLJ 186, *Wieland v. Cyril Lord Carpets Ltd.* [1969] 3 All ER 1006).

Consequently it is my view that it would be more consonant with the law and the requirements of justice, in this case, for me to take the fracture to the right femur, the lacerations to the right inguinal region, the right knee, shin and foot and the amputation of the leg in one sweep, noting that the conventional award for the amputation of the leg above the knee today is around RM50,000. The other focus here is the admitted serious injuries which the plaintiff has suffered in the genital area, as to which there are going to be lasting side effects. I agree with defence Counsel that *Tan Kit Buay (M.W.) & 2 Ors. v. Koh See Tee* is a very useful guide as to the proper award here for the genital injuries and the residual disabilities therefrom. There are some other significant factors, e.g. the wound over the right forearm, the unlikelihood of the plaintiff making any further contributions to the 70 million population target seeing as there have been no children after the first five, for the last six years, the normal daily routine of the plaintiff which does not include any other sporting or recreational activities, in which she was accustomed to indulge, the necessity for further remedial operation which will bring about a certain amount of pain and suffering, and other day-to-day irritations and drawbacks the permanent incapacity will cause.

Taking all these into consideration, and also the all important factor that the global sum assessed for several injuries should be scaled down by reason of overlapping, I consider the sum of RM85,000 a fair award for general damages for all the plaintiff's injuries on all counts.

Turning now to the issue of special damages and having regard to the submissions made by Counsel, I consider RM2,000 a fair award for the cost of an artificial limb and I agree with defence Counsel that it would be reasonable to provide for five renewals of the limb for the rest of the plaintiff's life span. I give RM10,000 under this head. In the absence of evidence from the plaintiff and the concession made by defence Counsel, I also award RM100 a year for maintenance for 30 years yielding RM3,000.

For revision surgery and incidental expenses I award RM4,000.

Since *Lee Sau Kong v. Leow Cheng Chiang* [1961] MLJ 19 the Courts of this country have repeated *ad nauseam* that damages have to be proved. But special damages must be strictly proved. To my mind the evidentiary burden here goes beyond establishing the claim on a mere balance of probabilities. The figure put forward for special damages must come as close to mathematical certainty as the circumstances of the case would allow.

Consequently, I do not propose to speculate on what the plaintiff may or may not have earned as a canteen operator. The licence of the canteen was her brother's and he was not called. No officer from the factory in which the canteen was located was called. Not a single document was produced. In examination-in-chief it was suggested that the earnings were in the order of RM10 to RM15 per day. In cross-examination, net earnings were reduced to RM5 to RM6 per day and in re-examination by her own Counsel this figure and further reduced to RM3 to RM4 per day. Albeit with considerable hesitation, I make an award for past earnings at the rate of RM4 per day for 26 working days per month for 15 months (i.e. from the date of the accident to the date of judgment) yielding RM1,560.

The plaintiff has stated that she proposes to return to her job as canteen operator. Once the artificial limb has been fitted, she will have sufficient mobility to carry out her pre-accident tasks. So the proper head of damage here is not for loss of future earnings, but something for a proportionate loss of earning capacity, attributable to the residual disabilities. My award here is RM5,000. For convenience of calculation, I have aggregated this to the sum of RM85,000 making RM90,000 for general damages and I award interest thereon at 8% per annum from the date of the service of the writ up to the date of this judgment.

The special damages which I have awarded are as follows:

1) Agreed specials	...	RM 2,153
2) 5 artificial limbs at RM2,000 each	...	RM10,000
3) Maintenance thereof for 30 years at RM100 per annum	...	RM 3,000
4) Revision surgery and incidentals	...	RM 4,000
5) Past earnings	...	RM 1,560
Total	...	RM20,713

There will be interest at 4% per annum from the date of the service of the writ on the agreed specials and past earnings or RM3,713 up to the date of this judgment. The other specials awarded have not yet been incurred. Consequently they will be lumped into the decretal amount of RM110,713 on which interest will run at 8% per annum from the date hereof up to realization.

One last word on costs. As I earlier observed, the disparity in what the plaintiff was asking, and what the defendant was prepared to offer was so wide that there was no option but for this case to go the whole hog. Maintaining credibility must be a matter of mutual concern both for the law and lawyers alike. The problem generated in this respect by permitting plaintiffs to persist in exaggerated notions of the value of their claims must be self-evident. One way of putting matters back into proper perspective is to take cognizance of the cases of *Calderbank v. Calderbank* [1975] All ER 333; *Cutts v. Head & Anor*. [1984] 1 All ER 557 and generally Supreme Court Practice (1985)-22/1/6; 62/2/11 and 62/2/86. A genuine offer letter without admission of liability can be made to do the work of an actual payment into Court.

But there are extenuating circumstances here. This case was plaintiffs' Counsel's maiden voyage into the sea of litigation and the client has been brought safely home to port. Liability not being in issue, it was open to the defendant to take the usual precautionary measures to save costs. Since this has not been done, I order that the costs of this action be taxed and paid by the defendant to the plaintiffs.

Also found at [1986] 1 CLJ 347